IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 987

TWYEFFORT, INC.,

Petitioner,

—against—

L. METCALFE WALLING, ADMINISTRATOR of the WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

MOTION BY PETITIONER TO ADVANCE THE ARGUMENT OF THE ABOVE ENTITLED CASE TO BE HEARD WITH No. 562, *Rutherford Food Corporation* v. *Walling*

WILLIAM H. TIMBERS
Attorney for Petitioner
15 Broad Street
New York, N. Y.

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NOTICE OF MOTION

Now comes the petitioner above named, by its attorney, William H. Timbers, and moves this Honorable Court for an order, pursuant to Rule 20 of the Rules of Court for the United States Supreme Court, to advance the argument of the above entitled case to be heard with No. 562 (*Rutherford Food Corporation* v. *Walling,* certiorari granted November 12, 1946).

Dated: New York, N. Y., February 4, 1947.

WILLIAM H. TIMBERS
Attorney for Petitioner
15 Broad Street
New York, N. Y.

To:

HON. J. HOWARD MCGRATH,
Solicitor General of the United States
WASHINGTON, D. C.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court
of the United States
WASHINGTON, D. C.

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AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

WILLIAM H. TIMBERS, sworn, says:

I am a member of the bar of this Court and am familiar with the proceedings herein, having tried the case for the defendant in the United States District Court for the Southern District of New York and having argued the appeal on behalf of the defendant in the United States Circuit Court of Appeals for the Second Circuit.

This affidavit is in support of a motion by the petitioner for an order, pursuant to Rule 20 of the Rules of Court for

the United States Supreme Court, to advance the argument of the above entitled case to be heard with No. 562, *Rutherford Food Corporation* v. *Walling*.

On November 12, 1946 this Court granted certiorari in No. 562, *Rutherford Food Corporation* v. *Walling*, to review a decision of the Circuit Court of Appeals for the Tenth Circuit (156 F. (2d) 513) which had reversed a judgment of the United States District Court for the District of Kansas denying an injunction as prayed for by the Administrator. The principal question in the *Rutherford Food* case is whether certain meat boners are employees of a meat plant operator within the meaning of the "suffer or permit to work" clause of the Fair Labor Standards Act or whether they are independent contractors.

There are numerous similarities between the status of the boners in the *Rutherford Food* case (as disclosed in the opinion of the Circuit Court of Appeals for the Tenth Circuit reported in 156 F. (2d) 513) and the status of the outside tailors in the instant case. The boners were paid by the hundredweight of boneless beef turned out and were paid weekly; the outside tailors are paid by the completed garment (fols. 2083, 2107) and it is claimed they are paid every Monday (fols. 2083, 2108). The plant operator furnished to the boners without payment of any rental the room in which the boning was done; the petitioner is said to pay the outside tailors sums of money with which to defray the rent on their shops (fols. 2081, 2112). The boners did work similar to that done by others who concededly were employees of the plant operator; the outside tailors are said to do work similar to that done by homeworkers and inside employees who concededly are employees of the petitioner (fols. 2085, 2105; 54-59). The boners determined their own hours; the outside tailors are

at liberty to work whenever they please (fols. 2084, 2109). The boners furnished their own hooks, knives and leather belts; the outside tailors use, maintain and replace their own sewing machines, needles, irons and similar equipment (fols. 2083, 2106). The boners were members of the union; several of the outside tailors are members of the Journeymen Tailors Union (fol. 2114). The plant operator never included the boners in its Workmen's Compensation liability policy and never made any deductions for unemployment compensation or withholding taxes; the petitioner has never made deductions from its payments to the outside tailors for unemployment insurance or social security taxes (fols. 2084-2085, 2105). The boners were found to have worked in excess of the maximum hours per week specified in the Act, without receiving any overtime compensation for the overtime worked, and the plant operator was found not to have kept any records relating to the time the boners actually worked; the petitioner has been held to have employed the outside tailors for work-weeks longer than 40 hours, without compensating them for their employment in excess of 40 hours per week, and to have failed to keep proper records as required by Section 11(c) of the Act (fols. 2117-2119).

The Circuit Court of Appeals for the Tenth Circuit in the *Rutherford Food* case stated (156 F. (2d) 513, 514) that there were involved in that case precisely the same provisions of the Fair Labor Standards Act as the Circuit Court of Appeals for the Second Circuit in the instant case has indicated are involved herein (Opinion, pp. 634, 638). The argument that it was not intended by the "suffer or permit to work" clause of the Act to create a new wage liability toward persons with respect to whom there otherwise would be no such liability and that the "suffer or permit to work" clause was intended to measure the extent of exist-

ing agreed wage liability, was rejected by the Circuit Court of Appeals for the Tenth Circuit (156 F. (2d) 513, 516) as it was by the District Court (fols. 2086-2094) and the Circuit Court of Appeals for the Second Circuit in the instant case (Opinion, pp. 638-640); accordingly, each of the courts mentioned refused to be guided in its construction of the statutory definition of "employee" by any of the standards existing at the time the Fair Labor Standards Act was enacted—standards which had become part of the common understanding of the people as to what constitutes an employer-employee relationship as distinguished from an independent contractor relationship (156 F. (2d) 513, 516; fols. 2086, 2087; Opinion, pp. 638-640).

This Court granted certiorari in the *Rutherford Food* case upon a petition presenting the following questions, in substance:

1. Whether it is the purpose of the Fair Labor Standards Act to create a wage liability to persons as to whom none would otherwise exist or to measure the extent of existing agreed wage liability.

2. Whether the phrase "suffer or permit to work" as used in the Act brings within its meaning persons with whom there is no contractual wage obligation.

3. Whether it is the purpose of the Act to bring employees of an independent contractor into employer-employee relationships with a plant operator on the basis of the work being performed in the plant.

The similarity between these questions in the *Rutherford Food* case and those presented in the petition for certiorari in the instant case is so clear as to require no argument.

The petition for certiorari in the *Rutherford Food* case also claimed a conflict between the decision by the Circuit Court of Appeals for the Tenth Circuit in that case and the decisions by the Circuit Courts of Appeals in the following cases:

Bowman v. *Pace Company,* 119 F. (2d) 858 (C. C. A. 5th, 1941);
Helena Glendale Ferry Co. v. *Walling,* 132 F. (2d) 616 (C. C. A. 8th, 1942);
Reconstruction Finance Corp. v. *Merryfield,* 134 F. (2d) 988 (C. C. A. 1st, 1943);
Walling v. *Sanders,* 136 F. (2d) 78 (C. C. A. 6th, 1943);
Walling v. *American Needlecrafts,* 139 F. (2d) 60 (C. C. A. 6th, 1943).

The above listed cases, claimed to be in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the *Rutherford Food* case, are also among those which are believed to be in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the instant case.

It may not be inappropriate to point out that factually the instant case is a much stronger independent contractor case, so far as the relationship between the outside tailors and the petitioner is concerned, than was the *Rutherford Food* case. The boners were subject to far greater supervision and control by the plant operator than is the case with the outside tailors, largely because the boners worked on the plant operator's premises, whereas the outside tailors work in their own shops and perform no services whatever on the petitioner's premises (fols. 2079, 2100). Moreover, the outside tailors have working for

them helpers and employees of their own ranging in number from one to fifteen for each outside tailor (fols. 174, 311, 470-471, 504, 634-635, 643-644, 662-665, 667, 671, 872, 1156, 1211-1214, 1854); the outside tailors are in partnership with other tailors who, not in privity with the petitioner, perform work upon the petitioner's goods and receive a share of the outside tailors' profits (fols. 1590-1592, 1595-1597, 1629-1632); and the outside tailors perform work for other tailoring establishments similar to and competitors of the petitioner and while working for the petitioner (fols. 200-202, 957-1003, 1169, 1212, 1693). None of these situations exists with respect to the boners in the *Rutherford Food* case. In substance, the outside tailors carry on their own tailoring businesses, wholly separate and distinct from the business of the petitioner, and therefore are independent contractors in a far more realistic way than were the boners in the *Rutherford Food* case.

We therefore submit that if there is any question as to whether the boners in the *Rutherford Food* case are employees or independent contractors, then *a fortiori* there is a grave question as to whether the outside tailors in the instant case are employees or independent contractors. In any event, since the questions presented by the *Rutherford Food* case have not been argued before this Court and since they are so strikingly similar to those presented by the instant case, we respectfully urge this Court to hear both cases at one time.

WHEREFORE, your deponent respectfully prays that an order be entered by this Court advancing the argument of the above entitled case so as to be heard with No. 562 (*Rutherford Food Corporation* v. *Walling*, certiorari granted November 12, 1946).

WILLIAM H. TIMBERS

Sworn to before
me this 3rd day
of February, 1947

ROSE F. ECKERT, Notary Public

[SEAL]